

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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SECURITIES AND EXCHANGE	:	
COMMISSION,	:	
	:	
Plaintiff,	:	Civil Action
	:	No. 05-11805-NMG
v.	:	
	:	
RICHARD F. SELDEN,	:	
	:	
Defendant.	:	
-----	x	

**DEFENDANT RICHARD F. SELDEN'S MEMORANDUM OF LAW IN
SUPPORT OF HIS UNOPPOSED MOTION TO AMEND THE SCHEDULING ORDER**

Because on February 10, 2006, the U.S. District Court for the District of Columbia stayed the related discovery action (See Exhibit 1 attached) pending ruling of the U.S. Court of Appeals for the D.C. Circuit in another case, defendant by this motion seeks a corresponding extension of the Scheduling Order dates in this case. Plaintiff Securities and Exchange Commission ("SEC") does not oppose this motion.

Background

On November 17, 2005, this Court held the Initial Scheduling Conference ("Scheduling Conference") in the above-captioned action and on January 13, 2006, entered the Scheduling Order in this case (Docket No. 13). Defendant Richard F. Selden ("Dr. Selden") now seeks to amend the Scheduling Order due to postponements experienced in seeking discovery from the Food and Drug Administration ("FDA"). Counsel for Dr. Selden has conferred with counsel for the SEC and has been authorized

to state that the SEC does not take a position on the recitation below of defendant's discovery efforts with the FDA, and does not oppose the relief sought by this motion.

According to the SEC's Complaint, Dr. Selden, in his position as CEO of Transkaryotic Therapies, Inc. ("TKT"), is responsible for a "series of materially misleading public statements by TKT about the status of the FDA application for Replagal." See Complaint ¶ 1. The SEC's case in this action is based on the FDA's review of TKT's application for Replagal, its communications with TKT in this regard and the steps both the FDA and TKT perceived as necessary for Replagal to obtain marketing approval in the United States. See, e.g., id. ¶¶ 2-4, 12-14, 21-22, 24-26, 28-33, 35, 38-39, 41-42, 44-53, 55, 59-60, 62, 66, 70 & 74. Consequently, discovery of the FDA's materials is important to Dr. Selden's defense of this action brought by the government.

Accordingly, on November 17, 2005, counsel for Dr. Selden advised the Court at the Scheduling Conference that Dr. Selden had subpoenaed the FDA on the first day he was permitted to do so by the Federal Rules of Civil Procedure, October 28, 2005, in an attempt to secure discovery vital to Dr. Selden's defense of this action. Counsel for Dr. Selden also advised the Court at the Scheduling Conference that counsel for Dr. Selden and the FDA already had communicated regarding compliance with the subpoenas, but had not been able to reach a resolution. We advised that the open issue of FDA discovery could impact the scheduling of this action going forward.

Since the Scheduling Conference, Dr. Selden took the following further steps diligently to further the FDA subpoena process and obtain discovery for his defense of this action sought thereby:

1. On November 23, 2005, when agreement could not be reached with FDA, Dr. Selden moved to compel the FDA's compliance with the subpoenas in the U.S. District Court for the District of Columbia.
2. On December 6, 2005, the FDA opposed Dr. Selden's motion to compel and cross-moved to quash the subpoenas.
3. On December 19, 2005, Dr. Selden opposed the FDA's motion to quash and replied in further support of his motion to compel.
4. On January 5, 2006, the FDA submitted a memorandum in further support of its motion to quash.
5. On February 10, 2006, Judge Urbina of the U.S. District Court for the District of Columbia issued an order holding the case in abeyance pending a decision in the U.S. Court of Appeals for the District of Columbia Circuit in Yousuf v. Samantar, No. 05-5197 (D.C. Cir.) ("Yousuf") on the ground that the subpoena to the federal agency in that case raises some of the same issues raised by the FDA in response to the subpoenas in this case.¹
6. On February 14, 2006, Dr. Selden joined in an Amici Curiae brief submitted to the U.S. Court of Appeals for the District of Columbia Circuit in connection with the Yousuf appeal.²
7. A decision in the Yousuf case is not expected until May 2006. See Table attached hereto as Exhibit 3.
8. Accordingly, Dr. Selden's FDA discovery likely will not occur until after May 2006, given that the U.S. District Court for the District of Columbia will need to address that decision's impact on Selden's FDA subpoenas and, if required, the FDA will take time to respond thereto.

Consequently, Dr. Selden has been actively seeking FDA discovery for 5 months.

Accordingly, Dr. Selden respectfully requests that the Court enter the Proposed Amended Scheduling Order attached as Exhibit A to Dr. Selden's motion,

¹ A copy of the docket in S.E.C. v. Selden, Case No. 1:05-mc-00476-RMU (D.D.C.) listing the motion practice in the U.S. District Court for the District of Columbia is attached as Exhibit 2.

² On February 17, 2006, the U.S. Department of Justice opposed the motion for leave to file and on February 24, 2006, the U.S. Court of Appeals for the District of Columbia Circuit denied the motion for leave to file.

which proposes extending the deadlines contained in the Scheduling Order by six months to reflect these developments.

Dated: February 27, 2006
Boston, Massachusetts

Respectfully submitted,

/s/ Thomas J. Dougherty
Thomas J. Dougherty (BBO #132300)
Justin J. Daniels (BBO #656118)
Cale P. Keable (BBO #651627)
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Counsel for Defendant
Richard F. Selden

CERTIFICATE OF SERVICE

I, Cale P. Keable, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on February 27, 2006.

Dated: February 27, 2006

/s/ Cale P. Keable
Cale P. Keable

Exhibit 1

Exhibit 2

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:05-mc-00476-RMU**

SECURITIES AND EXCHANGE COMMISSION v.
SELDEN
Assigned to: Judge Ricardo M. Urbina
Cause: Motion to Compel

Date Filed: 11/23/2005
Jury Demand: None
Nature of Suit: 441 Voting
Jurisdiction: Federal Question

Plaintiff

**SECURITIES AND EXCHANGE
COMMISSION**

represented by **SECURITIES AND EXCHANGE
COMMISSION
PRO SE**

V.

Defendant

RICHARD F. SELDEN

represented by **Joseph L. Barloon**
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V.

Interested Party

**UNITED STATES FOOD AND
DRUG ADMINISTRATION**

represented by **Marina Utgoff Braswell**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/23/2005	1	MOTION to Compel FDA compliance with subpoenas and request for oral hearing filed by RICHARD F. SELDEN. (Exhibits #A-J)(jsc) (Entered: 11/28/2005)
12/13/2005	2	NOTICE of Appearance by Marina Utgoff Braswell on behalf of UNITED STATES FOOD AND DRUG ADMINISTRATION (jf,) (Entered: 12/15/2005)
12/13/2005	3	MOTION for Extension of Time to 12/13/05 to file a response to defendant Selden's motion to compel by UNITED STATES FOOD AND DRUG ADMINISTRATION. EXHIBIT: (Motion to Quash/Oppositon) (jf,) (Entered: 12/15/2005)
12/15/2005		MINUTE ORDER granting [3] Motion for Extension of Time to file reponse to defendant Selden's Motion to Compel up to and including 12/13/05. Signed by Judge Ricardo M. Urbina on 12/15/05. (djr) (Entered: 12/15/2005)
12/15/2005	4	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Thomas J. Dougherty. :Address- SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, One Beacon Street, Boston, MA 02108. Phone No. - (617) 573-4800. by RICHARD F. SELDEN. (ks,) (Entered: 12/16/2005)
12/15/2005	5	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Justin J. Daniels. :Address- SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, One Beacon Street, Boston, MA 02108. Phone No. - (617) 573-4800. by RICHARD F. SELDEN. (ks,) (Entered: 12/16/2005)

12/15/2005	6	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Cale P. Keable. :Address- SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, One Beacon Street, Boston, MA 02108. Phone No. - (617) 573-4800. by RICHARD F. SELDEN. (ks,) (Entered: 12/16/2005)
12/15/2005	7	MOTION to Quash subpoenas duces tecum by UNITED STATES FOOD AND DRUG ADMINISTRATION. (jf,) (Entered: 12/20/2005)
12/15/2005	8	OPPOSITION to MOTION to Compel FDA compliance with subpoenas and request for oral hearing [1] filed by UNITED STATES FOOD AND DRUG ADMINISTRATION. (jf,) (Entered: 12/20/2005)
12/16/2005		MINUTE ORDER granting motion for admission pro hac vic [4],[5], and [6] as to Thomas Dougherty, Justin Daniels, and Cale Keable. Signed by Judge Ricardo M. Urbina on 12/16/05. (djr) (Entered: 12/16/2005)
12/19/2005	9	REPLY in support of MOTION to Compel FDA compliance with subpoenas and request for oral hearing [1] filed by RICHARD F. SELDEN. (jf,) (Entered: 12/20/2005)
12/19/2005	10	Memorandum in opposition to MOTION to Quash subpoenas duces tecum re [7] filed by RICHARD F. SELDEN. (jf,) (Entered: 12/20/2005)
12/27/2005	11	MOTION for Extension of Time to file a response to defendant Selden's opposition to FDA's motoin to quash by UNITED STATES FOOD AND DRUG ADMINISTRATION. (jf,) (Entered: 12/29/2005)
12/30/2005	12	Memorandum in Response to [11] Motion for Enlargement of Time filed by RICHARD F. SELDEN. (tg,) (Entered: 01/03/2006)
01/03/2006		MINUE ORDER granting [11] Motion for Extension of Time to file FDA's response. FDA's response due January 6, 2006. Signed by Judge Ricardo M. Urbina on 1/3/06. (djr) (Entered: 01/03/2006)
01/03/2006		Set Deadlines/Hearings: FDA'sResponse due by 1/6/2006 (jwd) (Entered: 01/05/2006)
01/05/2006	13	REPLY in support of MOTION to Quash subpoenas duces tecum [7] filed by UNITED STATES FOOD AND DRUG ADMINISTRATION. (jf,) (Entered: 01/06/2006)
01/30/2006	14	NOTICE of Filing by Non-Party FDA by UNITED STATES FOOD AND DRUG ADMINISTRATION (Attachments: # 1 Memorandum Opinion# 2 Order)(Braswell, Marina) (Entered: 01/30/2006)
02/10/2006	15	ORDER holding case in abeyance. Signed by Judge Ricardo M. Urbina on 2/10/06. (djr) (Entered: 02/10/2006)

Exhibit 3

Table B-4.
U.S. Courts of Appeals—Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit,
During the 12-Month Period Ending September 30, 2004

Circuit	Total Cases	From Filing of Notice of Appeal to Filing Last Brief		From Filing of Last Brief to Hearing or Submission		From Hearing to Final Disposition		From Submission to Final Disposition		From Filing of Notice of Appeal to Final Disposition		From Filing in Lower Court to Final Disposition in Appellate Court	
		Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months
ALL CASES													
TOTAL	27,438	15,246	5.3	18,324	3.7	8,645	2.1	18,793	.5	20,434	10.5	20,434	25.9
DISTRICT OF COLUMBIA	492	179	7.3	305	3.2	262	2.0	230	.7	304	10.5	304	28.6
FIRST	683	520	5.7	584	2.0	380	2.7	303	1.9	555	11.2	555	30.4
SECOND	1,777	1,142	6.4	1,205	2.7	1,047	.7	730	.2	1,449	11.0	1,449	32.0
THIRD	2,047	1,260	5.5	1,507	3.4	503	3.3	1,544	2.0	1,600	11.6	1,600	29.8
FOURTH	2,424	873	4.6	1,080	2.7	413	2.5	2,011	.6	1,852	7.5	1,852	20.2
FIFTH	4,018	2,149	5.5	2,324	2.8	752	2.0	3,266	.3	3,376	8.5	3,376	18.9
SIXTH	2,490	1,698	6.3	1,896	8.0	1,050	2.3	1,440	1.2	2,009	16.8	2,009	31.8
SEVENTH	1,411	911	4.8	1,009	2.9	738	2.8	673	.3	1,159	10.3	1,159	25.7
EIGHTH	1,860	1,024	3.5	1,142	4.7	649	3.6	1,211	.3	1,473	9.8	1,473	23.9
NINTH	5,783	2,332	6.2	3,884	5.4	1,805	1.2	3,978	.2	3,021	14.0	3,021	30.5
TENTH	1,349	1,046	5.1	1,113	3.9	390	3.9	959	1.5	1,159	11.7	1,159	25.9
ELEVENTH	3,104	2,112	4.3	2,275	2.4	656	2.0	2,448	.9	2,477	8.8	2,477	24.2
PRISONER PETITIONS													
TOTAL	4,520	2,383	6.2	2,383	3.6	872	1.9	3,648	.7	4,520	9.1	4,520	24.0
DISTRICT OF COLUMBIA	63	13	11.9	13	2.4	10	1.0	53	.7	63	7.5	63	17.6
FIRST	56	44	5.7	44	1.3	17	2.6	39	2.6	56	10.3	56	26.9
SECOND	249	164	8.6	164	3.0	116	.7	133	.2	249	12.1	249	35.2
THIRD	412	182	7.0	182	3.2	55	3.0	357	1.1	412	9.7	412	24.4
FOURTH	566	43	5.2	43	2.4	35	2.3	531	.4	566	4.9	566	16.3
FIFTH	647	286	5.0	286	3.1	51	2.0	596	.6	647	7.4	647	17.9
SIXTH	464	286	6.7	286	6.0	101	2.7	363	1.2	464	11.8	464	24.6
SEVENTH	293	188	7.7	188	2.9	69	3.2	224	.3	293	9.8	293	24.3
EIGHTH	287	106	5.1	106	5.1	35	4.1	252	.3	287	7.3	287	20.4
NINTH	775	608	7.6	608	4.8	299	1.0	476	.3	775	14.5	775	36.3
TENTH	285	204	4.1	204	3.2	31	4.2	254	1.6	285	9.1	285	21.4
ELEVENTH	423	259	5.4	259	2.3	53	2.2	370	.9	423	8.1	423	21.0

Table B-4. (September 30, 2004—Continued)

Circuit	Total Cases	From Filing of Notice of Appeal to Filing Last Brief		From Filing of Last Brief to Hearing or Submission		From Hearing to Final Disposition		From Submission to Final Disposition		From Filing of Notice of Appeal to Final Disposition		From Filing in Lower Court to Final Disposition in Appellate Court	
		Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months
OTHER CIVIL													
TOTAL	7,974	6,840	4.7	6,840	4.0	4,324	2.4	3,650	1.1	7,974	11.4	7,974	30.0
DISTRICT OF COLUMBIA	181	112	6.9	112	2.7	89	1.9	92	.7	181	10.5	181	29.7
FIRST	309	297	5.0	297	2.0	205	2.5	104	2.7	309	10.2	309	29.0
SECOND	701	581	6.0	581	2.7	563	.7	138	.2	701	10.4	701	33.8
THIRD	777	697	4.9	697	3.6	280	3.8	497	2.4	777	11.7	777	32.2
FOURTH	607	335	4.3	335	4.1	230	2.7	377	.6	607	8.5	607	21.4
FIFTH	916	838	4.6	838	3.5	453	2.1	463	1.1	916	9.8	916	27.6
SIXTH	869	830	5.6	830	9.7	576	2.5	293	1.3	869	18.1	869	35.9
SEVENTH	559	508	4.2	508	3.0	389	3.4	170	.1	559	10.5	559	28.7
EIGHTH	611	508	3.6	508	4.8	329	3.8	282	.4	611	10.8	611	27.3
NINTH	1,057	821	5.8	821	6.7	663	1.6	394	.3	1,057	15.6	1,057	33.0
TENTH	484	468	4.5	468	4.8	191	4.3	293	2.3	484	12.7	484	30.9
ELEVENTH	903	845	3.5	845	2.7	356	2.1	547	1.3	903	8.6	903	28.3
CRIMINAL													
TOTAL	7,559	5,697	5.9	5,697	2.9	2,344	1.9	5,215	.6	7,559	10.4	7,559	22.7
DISTRICT OF COLUMBIA	58	53	7.6	53	2.7	43	2.7	15	.6	58	13.2	58	31.1
FIRST	173	162	9.8	162	2.1	114	2.8	59	2.0	173	15.7	173	34.8
SECOND	467	370	7.1	370	2.6	292	.6	175	.2	467	11.7	467	29.7
THIRD	377	350	6.4	350	3.2	101	2.4	276	2.3	377	13.0	377	30.6
FOURTH	642	472	4.8	472	2.4	103	2.3	539	.8	642	9.1	642	20.9
FIFTH	1,759	972	6.5	972	1.8	181	1.4	1,578	.0	1,759	8.3	1,759	16.0
SIXTH	636	545	7.6	545	6.3	290	1.9	346	1.3	636	16.6	636	30.3
SEVENTH	283	193	5.5	193	2.6	177	2.2	106	.0	283	10.0	283	23.0
EIGHTH	557	393	3.3	393	4.4	220	3.1	337	.4	557	9.4	557	21.3
NINTH	1,126	860	5.7	860	4.3	457	1.2	669	.2	1,126	11.6	1,126	25.0
TENTH	359	347	6.1	347	2.4	143	3.2	216	1.0	359	11.3	359	23.0
ELEVENTH	1,122	980	5.1	980	2.3	223	1.9	899	1.1	1,122	9.2	1,122	21.6

Table B-4. (September 30, 2004—Continued)

Circuit	Total Cases	From Filing of Notice of Appeal to Filing Last Brief		From Filing of Last Brief to Hearing or Submission		From Hearing to Final Disposition		From Submission to Final Disposition		From Filing of Notice of Appeal to Final Disposition		From Filing in Lower Court to Final Disposition in Appellate Court	
		Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months	Cases	Interval in Months
ADMINISTRATIVE AGENCY													
TOTAL	3,957	-	-	3,078	4.6	877	1.7	3,080	.4	-	-	-	-
DISTRICT OF COLUMBIA	137	-	-	126	3.7	115	2.0	22	.8	-	-	-	-
FIRST	66	-	-	64	1.8	28	2.3	38	1.5	-	-	-	-
SECOND	99	-	-	63	2.6	48	.7	51	.2	-	-	-	-
THIRD	289	-	-	247	3.3	49	2.6	240	2.4	-	-	-	-
FOURTH	256	-	-	207	2.2	28	2.5	228	.9	-	-	-	-
FIFTH	201	-	-	175	3.0	33	3.4	168	.9	-	-	-	-
SIXTH	215	-	-	198	7.4	55	2.0	160	1.2	-	-	-	-
SEVENTH	108	-	-	98	3.0	85	2.1	23	.3	-	-	-	-
EIGHTH	148	-	-	118	5.5	55	2.8	93	.6	-	-	-	-
NINTH	2,182	-	-	1,552	6.5	346	1.0	1,836	.3	-	-	-	-
TENTH	71	-	-	67	4.5	18	3.4	53	2.6	-	-	-	-
ELEVENTH	185	-	-	163	2.0	17	.7	168	1.1	-	-	-	-
BANKRUPTCY													
TOTAL	381	326	4.5	326	4.1	211	2.5	170	1.1	381	11.8	381	21.0
DISTRICT OF COLUMBIA	2	1	-	1	-	1	-	1	-	2	6.7	2	21.6
FIRST	17	17	4.2	17	2.6	16	4.1	1	3.0	17	12.1	17	26.8
SECOND	32	27	5.5	27	2.7	25	.4	7	.1	32	10.4	32	18.2
THIRD	34	31	5.0	31	3.7	15	2.9	19	2.1	34	12.4	34	20.6
FOURTH	37	23	3.8	23	4.4	15	2.2	22	.8	37	8.6	37	16.6
FIFTH	54	53	4.2	53	3.6	33	2.5	21	1.4	54	10.1	54	18.5
SIXTH	40	37	6.0	37	9.6	28	2.4	12	1.8	40	18.3	40	28.8
SEVENTH	24	22	3.2	22	2.8	17	3.0	7	.2	24	10.4	24	18.9
EIGHTH	18	17	2.7	17	5.2	9	3.0	9	.3	18	10.5	18	16.5
NINTH	63	43	5.4	43	7.5	38	1.9	25	.3	63	16.1	63	26.2
TENTH	31	27	4.8	27	5.7	7	3.1	24	3.4	31	15.1	31	23.5
ELEVENTH	29	28	2.9	28	2.5	7	1.0	22	1.7	29	8.4	29	15.4

NOTE: THE SUBTOTALS DO NOT ADD UP TO THE NUMBER FOR TOTAL CASES BECAUSE TOTAL CASES INCLUDE ORIGINAL PROCEEDINGS NOT REPORTED SEPARATELY IN THIS TABLE. THIS TABLE DOES NOT INCLUDE DATA FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT. BEGINNING OCTOBER 1, 1998, DATA ARE REPORTED FOR TYPES OF ORIGINAL PROCEEDINGS PREVIOUSLY NOT PRESENTED IN THIS TABLE. * BEGINNING IN 2002 AND THROUGH 2004, THE COURTS OF APPEALS, PARTICULARLY IN THE SECOND AND NINTH CIRCUITS, EXPERIENCED AN UNPRECEDENTED INCREASE IN FILINGS OF NEW CASES ORIGINATING FROM THE BOARD OF IMMIGRATION APPEALS.